

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

ACS CONSTRUCTION COMPANY, INC.
OF MISSISSIPPI
VS.

PLAINTIFF
NO. 4:98CV220-P-B

SHELDON ELECTRIC CO., INC.

DEFENDANT

MEMORANDUM OPINION

This cause is before the Court on the defendant's Motion to Dismiss for Lack of Personal Jurisdiction. The Court, having considered the motion, the briefs and authorities cited, is prepared to rule. The Court finds as follows, to-wit:

FACTUAL BACKGROUND

This action arises out of a government contracting job within a construction setting. In 1994, ACS Construction Company, Inc., ("ACS"), a Mississippi corporation, was engaged in preparing bids for two government building contracts with the U.S. Army Corps of Engineers. Each of these contracts were to be performed at U.S. military bases: Fort Bragg, North Carolina and Fort Campbell, Kentucky. General Power Corporation, a South Carolina corporation, submitted bids to ACS for the purpose of securing a subcontract to perform the electrical work on the projects. The ownership of General Power breaks down as follows: Albert Cialone- 50% shareholder; Vengroff Williams & Associates, Inc.(Harvey Vengroff and Robert Williams, principals) and Sheldon Electric (Barry J. Beil, principal)- 25% each.

ACS was awarded both contracts and discussion regarding the possibility of awarding General Power the electrical subcontract began. However, when ACS was informed that General Power could not supply the performance and payment bond, as previously agreed, ACS became concerned and began searching for another candidate to perform the electrical work on the projects. General Power, intending to ease the concerns of ACS and provide assurances, invited ACS representatives to a meeting in New York. The invitation was declined and ACS instead invited

General Power to a meeting at ACS headquarters located in Greenwood, Mississippi.

The representatives of General Power who attended the Greenwood meeting were Al Cialone, Harvey Vengroff, and Barry Beil representing his company, Sheldon Electric. The meeting lasted approximately one and a half hours and was centered around conversation regarding the various aspects of the technical work that would be General Power's responsibility if indeed the subcontract was awarded to it. Mr. Beil gave assurances to ACS that Sheldon Electric would provide technical expertise to General Power in order to assure completion of the project. A brief part of the conversation was also devoted to General Power's financial ability to perform the subcontracts. Mr. Vengroff assured ACS that his company, Vengroff Williams, would provide the necessary financial support for completion by General Power of the subcontracts.

No contracts were signed at the Greenwood meeting, but ACS later awarded the two electrical subcontracts to General Power. The subcontract agreements covering the two projects were signed in North Carolina.

Several difficulties ensued during the course of completing the electrical work at Fort Bragg and Fort Campbell. Cialone failed as an administrator and Sheldon Electric, as well as Vengroff Williams came to the assistance of General Power. Despite these efforts, however, General Power's financial situation continued to deteriorate until, finally, it defaulted, left the job sites, and filed for bankruptcy.

ACS proceeded to file an action in this Court in January, 1996, against General Power and its 50% shareholder Al Cialone; Vengroff Williams & Associates, Inc. and its principals, Harvey Vengroff and Robert Williams; and Sheldon Electric and its principal, Barry Beil. Various theories were asserted by ACS including breach of two written contracts by General Power and breach of an implied-in-fact contract against Vengroff Williams and Mr. Vengroff and Mr. Williams, individually. ACS also alleged the torts of trover, conversion, material misrepresentation and fraud against Vengroff and Sheldon Electric, as well as their respective principals. Only the fraud, misrepresentation, breach of written contracts and breach of implied contract claims survived summary judgment, however. Subsequently, Sheldon Electric and Mr. Beil, along with other defendants, including Vengroff, moved

for dismissal based on lack of personal jurisdiction. The Court postponed ruling on the motion until the conclusion of ACS's case in chief.

At the close of ACS's presentation of its case in chief, the Court dismissed the fraud and misrepresentation claims. As a result, only the breach of contract claim against General Power and the breach of an implied-in-fact contract against Vengroff Williams and its principals remained. The Court then concluded that personal jurisdiction did, indeed, exist against all the defendants, except for Mr. Williams, based on the meeting which took place in Greenwood, Mississippi.¹ Sheldon Electric and Mr. Beil were, however, dismissed when it came to the attention of the Court that no contract claims were pending against these defendants.

The jury returned a verdict in favor of ACS against General Power for the breach of the written contracts and also found favorably for ACS against Vengroff Williams for breach of an implied-in-fact contract. On appeal, however, the Fifth Circuit held that no contract was formed between ACS and Vengroff Williams, and, consequently, the Court lacked personal jurisdiction over Vengroff Williams because the "contract prong" of the Mississippi long-arm statute was not satisfied.² The Court's judgment was, therefore, reversed and remanded so that the Court could dismiss the action without prejudice.

In the interim, prior to the ruling on appeal by the Fifth Circuit, ACS filed this action for breach of contract against Sheldon Electric.³ ACS alleges the existence of an "oral" or "implied-in-fact" contract with Sheldon Electric formed primarily on the basis of the communications which transpired between ACS and Barry Beil during the Greenwood meeting. Sheldon now seeks dismissal based on

¹ Williams did not attend the Greenwood meeting.

² ACS Construction Company, Inc. v. General Power Corp. et al., No. 98-60491 (5th Cir. 2000) (hereinafter referred to as the "Vengroff case" or "Vengroff appeal")

³ This action was filed on November 6, 1998. The judgment by the Fifth Circuit in the Vengroff appeal came down on February 2, 2000.

lack of personal jurisdiction arguing that no contract was ever formed during the Greenwood meeting or at any other time and, consequently, Mississippi's long-arm statute has not been satisfied.

LEGAL ANALYSIS

A court sitting in diversity determines personal jurisdiction according to a two step inquiry. First, it must be determined whether the long arm statute of the forum confers jurisdiction on the nonresident defendant. Latshaw v. Johnson, 167 F.3d 208, 211 (5th Cir. 1999). Second, it is asked whether the "exercise of jurisdiction by the forum state is consistent with due process under the United States Constitution." Id. Both inquiries must be resolved in the affirmative or in personam jurisdiction may not be asserted.⁴ Indeed, if it is found that the forum's long arm statute is not satisfied, the federal due process inquiry is never even reached and jurisdiction fails. Cycles v. Digby, 889 F.2d 612, 616 (5th Cir. 1989).

The first inquiry then, must be to determine whether Mississippi's long-arm statute authorizes jurisdiction over Sheldon Electric. Under what is known as the "contract prong" of the statute:

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state... shall by such acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.

Miss. Code Ann. § 13-3-57. As an explicit proposition, therefore, the existence of an enforceable contract must precede a finding of personal jurisdiction under this section.

An enforceable contract exists under Mississippi law if it is determined by the fact-finder that "both parties agreed to all of the essential terms". Ham Marine, Inc. v. Dresser Industries, Inc., 72 F.3d

⁴ It is well settled that Mississippi's long arm statute is not coextensive with due process. Stripling v. Jordan Production Co., LLC, 234 F.3d 863, 869 n.7 (5th Cir. 2000); *See also* Tichenor v. Roman Catholic Church, 32 F.3d 953, 958 (5th Cir. 1994). Thus, each prong is addressed separately. Coats v. Penrod Drilling Corp., 5 F.3d 877, 882 n.5 (5th Cir. 1993).

454, 459 (5th Cir. 1995). "Essential terms" ordinarily include (1) the scope of the service to be performed, (2) the price, and (3) the date by which the work was to be completed. Id. Where the essential terms are too vague and indefinite, the oral agreement will fail. ACS, No. 98-60491 at *8. As the Fifth Circuit noted in the Vengroff appeal, "several cases decided under Mississippi law refuse to enforce oral contracts where essential terms are too vague and indefinite". Id. at *7; See Beck v. Goodwin, 456 So.2d 758, 761 (Miss. 1984) (oral agreement by bank to finance used car business unenforceable for vagueness and indefiniteness); First Money, Inc. v. Frisby, 369 So.2d 746, 751 (Miss. 1979)(oral loan commitment too vague and indefinite); Izard v. Jackson Production Credit Corp., 195 So.2d 331, 333 (1940)(oral commitment to finance cotton crop too vague and indefinite).

Turning to the instant case, ACS argues that a contract was formed on the basis of the hour and a half Greenwood meeting. According to ACS, during the meeting, Sheldon: (1) promised ACS it would provide technical expertise to assure completion of General Power's subcontracts; (2) provided ACS with its company's brochure detailing its capabilities and (3) reviewed the plans and specifications for the projects. However, neither the scope, nor the duration of Sheldon Electric's participation in the projects was sufficiently definite. No specific parameters were discussed during the meeting such that, under Mississippi law, contract formation could be construed.

The Fifth Circuit, in concluding that no contract was formed between Vengroff Williams and ACS with regard to Vengroff's promise to finance General Power, noted that:

Mr. Vengroff never stated how much money he was willing to contribute to General Power and never stated how long he was willing to continue funding General Power. Assuming as we must that Vengroff promised to fund General power to the extent necessary to assure General Power's performance, such a vague and indefinite promise is insufficient as a matter of law to constitute an enforceable contract.

ACS, No. 98-60491 at *8. ACS finds itself in a virtually identical position with regard to Sheldon Electric as it did with Vengroff. The only difference between the factual circumstances between the two is that Sheldon promised to provide technical support rather than financing and conversation about

technical support was accentuated for the greater part of the Greenwood meeting. Perhaps the conversation about the technical work with Mr. Beil was more detailed than the conversation involving Mr. Vengroff about the financing, but, nevertheless, ACS has failed to delineate sufficient factual differences between the positions of Sheldon Electric and Vengroff to justify a departure from the Fifth Circuit's result in the Vengroff case.

Finally, the Court rejects ACS's argument that jurisdiction may be asserted over Sheldon based on the "doing business" prong of the long arm statute. That prong authorizes jurisdiction on the basis of "doing business or any character of work or service" in Mississippi. Miss. Code Ann. §13-3-57. To determine whether a defendant is "doing business" in the state, the Court looks to whether Sheldon Electric (1) did some act or consummated a transaction in Mississippi and (2) whether the assumption of jurisdiction would offend traditional notions of fair play and substantial justice. Kekko v. K & B Louisiana Corp., 716 So.2d 682, 683 (Miss.App. 1998). As already noted, no contract was formed or transaction "consummated" at the Greenwood meeting. The only act which was consummated was the meeting itself. Even assuming an act was consummated within the meaning of the statute, however, the second part of the test is not satisfied. That part must be considered "in light of the amount and type of activity in the state, the relative convenience of the parties, the benefits and protections of Mississippi's laws afforded the parties and the equities of the situation." Gross v. Chevrolet Country, Inc., 655 So.2d 873, 877-78 (citing Rittenhouse v. Mabry, 832 F.2d 1380, 1384 (5th Cir. 1987)). Taking into account such considerations, the Court concludes that asserting jurisdiction over Sheldon would "offend traditional notions of fair play and substantial justice". Sheldon's only contact with Mississippi subsists in the hour and a half Greenwood meeting in which, as already discussed, no contract was formed. Such a tenuous connection is insufficient to satisfy the "doing business" prong of the Mississippi long arm statute. Likewise, the administrative and clerical functions performed by ACS

⁵ See e.g. Martin & Martin v. Jones, 616 F.Supp. 939, 342-43 (D.C. Miss. 1985) (holding

involving Sheldon are not enough to satisfy §13-3-57.⁵ To hold otherwise would render the Mississippi long arm statute virtually meaningless; any Mississippi corporation would be able to sue anybody, no matter how tenuous the contact with the forum, based on unilateral clerical activities performed in Mississippi.⁶

In short, the Court concludes that the Fifth Circuit's analysis in the Vengroff case is directly on point. Under a substantially similar analysis, the Court finds that no contract was formed between ACS and Sheldon Electric at the Greenwood meeting. Moreover, Sheldon Electric cannot be held to have been "doing business" in Mississippi within the meaning of §13-3-57 such that jurisdiction may be asserted by this Court. Consequently, neither the "contract prong" nor the "doing business" prong of Mississippi's long-arm statute is satisfied and the Court lacks personal jurisdiction over the defendant.

CONCLUSION

After careful consideration, the Court finds that personal jurisdiction over Sheldon Electric is lacking. However, the Court is not opposed to transferring the case to a venue which has jurisdiction.⁷ Therefore, the plaintiff has ten days from the date of the entry of the accompanying order to inform the Court whether it elects transfer, and if so, where. If the plaintiff has not responded within that time, the

that long-arm jurisdiction in Mississippi over Alabama residents in connection with suit by Mississippi attorneys who had been hired in connection with administration of estate in Alabama could not be predicated on the basis of the attorneys having searched land records in Mississippi, having corresponded and communicated with the defendants from their office in Mississippi, and having frequently met with one of the clients and her husband in Mississippi).

⁶ Moreover, the long arm inquiry would be subsumed into a minimum contacts, due process analysis. As already discussed, it was not the intent of the legislature to make Mississippi's long arm statute coextensive with due process which defines the constitutional boundary within which personal jurisdiction may be exercised. Stripling, 234 F.3d 863, 869 n.7 (5th Cir. 2000).

⁷ "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. §1406(a); Goldlawr, Inc. v. Heiman, 82 S.Ct. 913 (1962).

Court will enter an order dismissing the claims against Sheldon Electric without prejudice. A separate order in accordance with this opinion will be so entered.

THIS, the ____ day of October, 2001.

W. ALLEN PEPPER, JR.
UNITED STATES DISTRICT JUDGE